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In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER TERRITO, ET AL., APPELLANTS

v.

CURTIS POCHE, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of May 2, 1977.

STATEMENT

Curtis Poche, Sr., was fatally injured in an accident in the course of his employment in a Louisiana shipyard on August 17, 1973 (J.S. App. A-4). He was injured while working on the hull of a ship that had not yet been launched (*ibid.*).

Avondale Shipyards, Inc., Poche's employer, initially paid workers' compensation death benefits to his survivors at the rate prescribed by the Louisiana Workmen's Compensation Act. Appellees, dissatisfied with these payments, filed a wrongful-death action in state court against Avondale and against appellants, who are executive officers of Avondale. Such tort suits were permitted in Louisiana, where the workers' compensation statute established

an exclusive remedy only against the employer itself. See La. Rev. Stat. Ann. §§ 23-1021 to 23-1351 (West 1964).[1]

Avondale then belatedly reported the injury and death under Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1439, as amended, 33 U.S.C. 930, and attempted to pay death benefits at the rate required by the federal Act—a rate, in Poche's case, more than twice the amount provided by Louisiana law. Both the report and the payment took place more than a year after the time within which such action is required by the federal Act.[2] Appellees returned Avondale's check for compensation under the federal Act; they maintained that they would pursue only their remedies under Louisiana law (J.S. App. A-23).

In the state court action appellants asserted that the Longshoremen's Act, as amended in 1972, applied to Poche's death, and that Section 33(i) of the federal Act, as amended, 73 Stat. 392, 33 U.S.C. 933(i), immunized them from tort liability. The state court agreed with this argument.[3]

On appeal, appellants added the argument that the Longshoremen's Act preempted the state workers' compensation law in its entirety. The intermediate appellate court rejected this argument, holding that the 1972 amendments to the federal Act had not preempted state legislation and

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[1]The state law has been repealed, and the liability of executives abolished, during the pendency of this litigation. 1976 La. Acts No. 147 (July 16, 1976). Because this is a tort suit for accrued liability, however, the repeal does not affect the proper disposition of the case.

[2]See Sections 14(a), 14(b), and 30(a), 44 Stat. 1432, 1439, as amended, 33 U.S.C. 914(a), 914(b), and 930(a).

[3]The court also dismissed the action against Avondale on state law grounds (see J.S. App. A-24), and that decision is not in issue here.

that within the new coverage of the federal Act the "right to elect to receive benefits under the Louisiana Workmen's Compensation Act remained unaffected" (329 So. 2d 211, 217 (La. Ct. App.)). Nevertheless, the court accepted appellants' argument that Louisiana's "executive liability" action was "expressly prohibited" by Section 33(i) of the federal Act, and that "the option to elect state or federal remedies [does not] exten[d] to third party actions as well as compensation claims" (*id.* at 218). The court therefore affirmed the dismissal of the action.

The Supreme Court of Louisiana reversed (J.S. App. A-3 to A-24; 339 So. 2d 1212). It agreed with the court of appeals that the compensation provisions of the federal Act and of the state statute could apply concurrently (J.S. App. A-9 to A-21). It also concluded, however, that although the provisons of federal and state law regarding negligence actions against persons other than the employer are "different" (*id.* at A-22), the State was entitled to apply its provisions once it had been determined that both bodies of law might apply. Consequently, the court held, appellees' decision to proceed under state law allowed them to sue appellants under state law, without regard to the provisions of federal law.

DISCUSSION

Appellants contend that La. Rev. Stat. Ann. § 23-1101 (West 1964), which before its repeal[4] allowed third-party tort suits to supplement the no-fault workers' compensation remedy in that State, is preempted by federal

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[4]See note 1, *supra*.

law.[5] Although appellants' arguments are not entirely clear, we assume that they seek to present contentions similar to those they pressed below: that the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, entirely preempts all state workers' compensation plans within the extent of federal coverage and that, in any event, Section 33(i) of the federal Act preempts any state provisions permitting tort recovery from third parties (see J.S. App. A-9). We discuss these arguments in turn.

1. This Court has recently considered the effects of the 1972 amendments to the federal statute. *Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444, decided June 17, 1977. In order to provide a uniform compensation system, with increased benefits, for waterfront workers, the 1972 amendments greatly expanded the federal Act's coverage of injuries that occurred on land. Shipbuilders are among the newly-covered workers, and under the federal Act appellees are entitled to federal benefits. See *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (C.A. 5), certiorari denied (on this issue) *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty*, June 27, 1977 (No. 76-880); *Dravo Corp.* v. *Maxin*, 545 F. 2d 374 (C.A. 3), certiorari denied, June 27, 1977 (No. 76-1093).

Although the 1972 amendments expand dramatically the scope of the federal statute's coverage, they do not alter the nature of that coverage within the new outer bounds.

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[5]This claim of preemption falls within the appellate jurisdiction of this Court under 28 U.S.C. 1257(2). See *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204. Appellants also contend that the decision below is "tantamount to a striking down of 33 U.S.C. §933(i)" (J.S. 6), so as to invoke jurisdiction under 28 U.S.C. 1257(1), but this contention is insubstantial. The state court construed the federal statute not to preempt state law, but such a construction does not "strike down" or "invalidate" any statute.

Section 33(i), upon which appellants apparently rely, predated the 1972 amendments and was not changed by them. Indeed, the only alteration of the basic plan of the statute that might affect its relationship with state compensation programs appears to make coexistence of overlapping remedies more consistent with the statutory text. Prior to 1972, Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a), provided that compensation would be payable under the federal Act only if the injury occurred on the navigable waters and "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." This appeared to require the courts to make both federal and state coverage exclusive within separate domains; the provision was deleted in 1972.

Even before 1972, however, the federal and state compensation systems overlapped in practice, and this Court upheld that overlap.

The federal statute was passed in 1927, during a time of uncertainty about the constitutionally-permissible extent of the coverage of state workers' compensation laws. The Court had held that States could not provide compensation for certain workers injured on navigable waters, and it had invalidated two attempts by Congress to authorize the States to provide compensation.[6] The statute Congress passed in 1927, however, seemed to be open to as much uncertainty as the constitutional question; every compensation case potentially required an adjudication of the constitutional limits of the States' power, because Section 3(a) said that if the States could "validly" provide compensation, the federal statute did not apply.

The Court resolved some of the ensuing problems by creating, in *Davis* v. *Department of Labor*, 317 U.S. 249, a "twilight zone" in which both federal and state law could

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[6]See *Caputo*, *supra*, slip op. 6-10.

apply. The Court held that the federal statute did not oust state remedies (317 U.S. at 255), and that an employee who obtained compensation under either state or federal law would not have his award upset, except in extraordinary cases, on the argument that the other law might also have been applied. Mr. Justice Frankfurter, concurring (*id.* at 259), pointed out that recovery under either state or federal statute would be permissible. Only Mr. Chief Justice Stone dissented, and his dissent, which would have held that the federal statute was the exclusive remedy within the scope of its operation, simply made it plain that the Court had rejected any notion that state laws were preempted.[7]

The principle of *Davis* was reiterated in *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, which explicitly held that any worker injured in the "twilight zone" could pursue remedies under either state or federal compensation schemes; the federal statute did not preempt the state statute, and recovery under the state statute was sustained in *Hahn* even though the injury took place on the navigable waters and the employee unquestionably would have been entitled to federal benefits.

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[7]The Court also has held that the coexistence of workers' compensation remedies does not depend, as the Supreme Court of Louisiana apparently concluded in the present case, upon the making of an "election" to seek remedies under one statute or the other. See *Industrial Commission* v. *McCartin*, 330 U.S. 622 (the application of more than one workers' compensation law is permissible so long as the worker obtains only a single recovery measured by the total permitted under the more generous statute). In *McCartin* itself the Court held that a worker could recover full benefits under Illinois law and then obtain additional benefits provided by Wisconsin law. The Full Faith and Credit Clause (which operates, once one State has rendered a judgment, much like the Supremacy Clause upon which appellants rely) was satisified, the Court concluded, by crediting the Illinois recovery against the amounts owing under Wisconsin law. The same reasoning applies to recovery under state and federal law. *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 131-132.

The Court repudiated any lingering doubt that state and federal remedies were mutually exclusive in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, holding (*id.* at 131-132) that a worker could seek and obtain benefits under both state and federal law so long as there was not multiple recovery for the same injury.

Nothing in the legislative history of the 1972 amendments to the federal Act indicates congressional dissatisfaction with these cases, to the extent they allowed workers to pursue state remedies even though a federal remedy also was available. Congress redressed much of the uncertainty in the scope of federal coverage that had caused many workers to seek state remedies, but there is no reason to believe that Congress wanted to prevent the newly-covered workers from pursuing favorable state remedies. There would be no reason to conclude that workers may recover under state law if injured over the water (as in *Hahn*) but not on land (as in the present case); since the federal interest in uniform remedies for injuries is strongest when the injury takes place on the water, the preemptive effect of federal legislation should be less, not more, as applied to injuries on the land.[8]

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[8]Without exception, scholars of the subject have concluded that nothing in the 1972 amendments to the federal statute preempts state workers' compensation statutes. See Gilmore and Black, *The Law of Admiralty* 425-426, 431-434, 924-926 (2d ed. 1975); 4 Larson, *The Law of Workmen's Compensation* §§ 89.52-89.53, 89.70 (1976); Larson, *The Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments*, 14 Houston L. Rev. 287 (1977); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694-695 (1973). See also Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts*, 45 So. Cal. L. Rev. 699 (1972).

Remedies overlap in many other areas of the law, too. For example, victims of discrimination in employment may have remedies

2. There remains the possibility that the state remedy should be preempted in this case because it involves a conflict not between federal and state workers' compensation remedies, but between a state statute permitting third-party recoveries against fellow employees and Section 33(i) of the Longshoremen's Act, which forbids such recoveries.

The scant legislative history of Section 33(i) indicates that it was intended to prevent circumvention of the rule that recovery under the Longshoremen's Act would be the sole *federal* remedy for a maritime injury.[9] It supplements Section 5, 33 U.S.C. 905, which abolished the right to full compensatory damages from the employers of covered workers; its primary purpose was to prevent tort actions by longshoremen indirectly against their employers, and it was the first of a series of changes that culminated in the adoption, in 1972, of a ban on successive actions by longshoremen against a vessel, and the vessel against the longshoremen's employers. See Section 5(b), 86 Stat. 1263,

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under private contracts, under state administrative and judicial procedures, federal administrative remedies, and at least two federal statutory remedies. The profusion of remedial devices does not, however, mean that one preempts another or that only one may be used. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36; cf. *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229.

[9]Section 33(i) was enacted in 1959 as part of a complete revision of Section 33 in the wake of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124. See 73 Stat. 392. What little legislative history there is is contained in H.R. Rep. No. 229, 86th Cong., 1st Sess. (1959); S. Rep. No. 428, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 2286, 85th Cong., 2d Sess. (1958); S. Rep. No. 2481, 85th Cong., 2d Sess. (1958); Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special Subcommittee of the House Committee on Education and Labor, 84th Cong., 2d Sess. 16-17, 23-24, 39, 82-83, 84, 91-92, 93, 104, 110, 133 (1956).

33 U.S.C. (Supp. V) 905(b); *Caputo, supra*, slip op. 11-12 n. 18. See also *Reed* v. *The Yaka*, 373 U.S. 410; *Jackson* v. *Lykes Bros. S.S. Co.*, 386 U.S. 731.

Section 33(i) simply does not address the problem of adjusting overlapping remedies under the laws of two sovereigns. It must have been clear when Section 33(i) was added to the Act that *Hahn*, decided only seven months before, had established that federal and state remedies operated concurrently at least within the "twilight zone"—that is, every area in which state law arguably could apply. Nothing in the legislative history of Section 33(i) indicates congressional dissatisfaction with *Hahn*. If there is any doubt about this, it should be resolved, as it has been in the past, by construing the federal statute liberally in favor of injured workers. See *Caputo, supra*, slip op. 17. Workers' compensation statutes are enacted primarily for the benefit of workers and their families, and they "should not readily [be] interpret[ed] * * * so as to cut off an employee's right to sue under other legislation passed for his benefit." *Industrial Commission* v. *McCartin*, 330 U.S. 622, 628. Here, as elsewhere when there is no clear congressional intention to oust state remedies, it is appropriate to construe the federal statute to leave room for the operation of a system of state remedies that supplements the federal remedy. *De Canas* v. *Bica*, 424 U.S. 351.[10]

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[10]*Jones* v. *Rath Packing Co.*, No. 75-1053, decided March 29, 1977, does not look in a contrary direction. The Court concluded in *Jones* that part of California's foodstuff weights and measures system was preempted by federal statutes that required different weights and measures standards. But in *Jones* one of the federal statutes contained an explicit declaration of preemption. Perhaps more important, however, is the fact that in *Jones* the federal and state statutes created different substantive rules concerning the packaging and labeling of foodstuffs; the present case involves only a different approach to the

3. The question presented by this case is important. Now that the federal statute has been extended to cover injuries on land, there will inevitably be a considerable overlap of the federal remedy and the state remedies that traditionally have applied to waterfront injuries. We have been informed by the Department of Labor that almost all States have workers' compensation statutes that might apply to some workers also covered by the federal Act, and that approximately half of the States permit some form of third party liability against other employees of a common employer.[11]

But the creation of a federal remedy for injuries on land does not raise any legal question that this Court has not already faced and resolved; the new provisions of the federal Act no more preempt state remedies for injuries on land than the old provisions preempted state remedies for injuries on the water. There is no indication that a system of overlapping state and federal remedies would hinder the achievement of the purpose of the federal statute, and there is no reason to believe that Congress intended in 1972 to set aside this Court's holdings in *Davis*, *Hahn* and *Calbeck* that such an overlap is consistent with the federal statute. There is accordingly no reason for the Court to grant plenary review in this case.

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question of remedies for the breach of the acknowledged duty to maintain a safe workplace. Appellants and Avondale are not in the untenable position of owing conflicting duties to two sovereigns, and nothing in the state compensation provisions "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Jones*, *supra*, slip op. 5, quoting from *Hines* v. *Davidowitz*, 312 U.S. 52, 67.

[11]The importance of the present case, however, is substantially diminished by the fact that Louisiana has repealed the statute under which appellees brought this suit. See note 1, *supra*.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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